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THE MAKINGS OF DANGEROUS OFFENDERS: THE ORIGINS' DIFFUSION AND USE OF LEGISLATION FOR DANGEROUS OFFENDERS IN EUROPE AND NORTH AMERICA

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ABSTRACT

This study examines the origins, diffusion and use of special legal sanctions for dangerous offenders with a special focus on the development of the 1977 Canadian Dangerous Offender legislation.

Legislation for "criminal psychopaths" or "dangerous offenders" arose to deal with the problem of protecting society against persistent and mentally abnormal offenders not deterred by regular penal sanctions. Such legislation spread throughout Europe, North America and South America during the first half of the twentieth century. Fundamental to dangerous offender legislation from the beginning has been the use of psychiatrists to assess dangerousness or determine the existence of clinical states such as psychopathy. Psychiatry, however, has been strongly criticized on the basis of research findings showing that psychiatrists do not assess dangerousness with high validity and reliability. Follow-up studies of allegedly dangerous persons released by court decisions have revealed, in particular, that there are high numbers of "false positives" - individuals diagnosed as dangerous who are not detected in acts of violence.

Although there have been some efforts to "depsychiatrize" or limit psychiatric influence in dangerous offender legislation, existing legislation persists and new legislation has recently been called for in such jurisdictions as France and England and Wales.

Why is dangerous offender legislation persisting in popularity? Five factors have been identified as contributing to the persistence of dangerous offender legislation.

First, there is the dramatic impact of the violent and non-consensual sexual offences with which the legislation is designed to deal. Second, there is the widespread tendency to associate violent and sexual offences with mental or character disorder. Third, there is a lack of articulation between civil mental health controls and criminal controls. Fourth, there is a tendency in social policy to advocate the identification and incapacitation of dangerous offenders along with more lenient measures for non-dangerous minor offenders. Fifth, government representatives and social control agents feel that it is important that they be seen to be <u>doing something</u> about highly visible crimes. The function of dangerous offender legislation, which - in many jurisdictions - is rarely used, is more symbolic than instrumental.

Although critics citing the now voluminous research findings have called for the abolition of dangerous offender legislation, a case can be made for its retention in Canada if certain amendments are made. Most important is that only the most serious personal violence offences (outside of murder) should be part of the legislation's offence criteria. Second, vague imprecise terminology and unfounded assumptions should be removed from the statement of the legislation. Finally, the actual process of assessing dangerousness might be improved by the use of mixed composition assessment boards (as opposed to psychiatrists alone) and the development of guidelines for doing assessments.

This study of dangerous offender legislation is intended not only as a means of evaluating and improving the present legislation in Canada but also as a study of the policy-making process itself. By examining the origins, diffusion and use of dangerous offender legislation on a comparative basis we can be more aware of the constraints policy-makers and legislators face and the assumptions which guide their decisions.

SUMMARY

This study examines the origins, diffusion, and use - in Europe and North America - of special legal sanctions for dangerous offenders. Special attention is given to the development of the 1977 Canadian Dangerous Offenders Legislation and the ways it might be improved in light of research findings and the experience - both historial and contemporary - of other jurisdictions.

The use of the notion of dangerouss (l'état dangereux) to indicate an individual's predisposition to criminal or anti-social activity is part of a distinct philosophy of social control that dates back to the writings of positivist and social defence theorists in nineteenth century Europe and American forensic psychiatrists going back to Benjamin Rush in the eighteenth century. Underlying these writings is a deep-rooted popular image of the criminal who is a menace to society because of some form of mental or character disorder or because he or she was just "born bad". This popular image is the basis for the notions of the "criminal man" and "the psychopath" which were the predecessors of the term "dangerous offender". Acceptance by legislators of the notion of psychopathy - an alleged disorder of the individual capacity for moral judgement - and later the notion of dangerousness has led to the use of psychiatric diagnoses and predictions of future behaviour in decisions to sentence (or commit) and ultimately release allegedly dangerous persons.

Following standard medical-psychiatric thinking, confinement has generally been indeterminate on the grounds that what is involved is either:

a) an enduring - perhaps inborn - state of individual dangerousness that must be contained to protect society;

b) a curable but difficult-to-treat disorder that may require many years of treatment before an individual can be safely released.

Civil mental health legislation and criminal legislation using the notion of dangerousness spread throughout Europe and North America and South America in the late nineteenth century and first half of the twentieth century. In Europe much of such legislation has been concerned with the persistent - often petty - offender. In the United States the sexual offender ("sexual psychopath") has been the main concern. The original Canadian preventive confinement legislation for habitual offenders (1947) and criminal sexual psychopaths (1948) was influenced by both European - particularly British - legislation for persistent offenders and by the special civil statutes for sexual psychopaths in the United States.

In the last two decades there has been a great deal of criticism of dangerous offender legislation. One source of criticism has been from the civil liberties movement which argues that such legislation fails to provide adequate safeguards for persons alleged to be dangerous. A second source of criticism, which reinforces the

concerns of the civil libertarians, has come from research on psychiatric diagnosis and prediction.. A large body of research (for example the follow-up studies of allegedly dangerous persons released by court decisions) has led to the conclusion that psychiatry over-predicts violence and sexual offences in those assessed as dangerous. The number of persons assessed as dangerous who are not detected in violent or sexual offences (the so-called false positives) is always well over sixty percent.

One result of the research findings on psychiatric assessments of dangerousness has been the attempt to "depsychiatrize" or limit psychiatric influence in dangerousness legislation. Some examples of this are the recent legislative amendments in Denmark and Finland, the Model Sentencing Act in the United States (1963) and the adoption of some of the wording of the Model Sentencing Act in the 1977 Canadian Dangerous Offender Legislation. Except for some of the Nordic countries, however, psychiatric experts are still used to assess dangerousness.

Despite the criticisms of dangerous offender legislation, existing statutes persist and new measures are being enacted. The 1977 Canadian dangerous offender legislation, for example, was enacted in the face of considerable criticism which pointed to the research showing the low validity and reliability of assessments of dangerousness.

The persisting popularity of dangerous offender legislation appears to be related to several factors:

1) the visibility and dramatic impact of violent offences and certain non-consensual sexual offences, even though they are infrequent, and the sense of fear, repugnance, and moral indignation they arouse;

2) the linkage of violent and sexual offences to mental or character disorder and the belief that psychiatric expertise is required to identify dangerous persons and that special treatment and incapacitation measures are necessary because regular sentences will not deter dangerous mentally disordered offenders;

3) the lack of articulation between conventional criminal social controls and civil social controls with the result that those offenders diagnosed as dangerous but non certifiable, must be released upon completion of their sentences;

4) the tendency to advocate "bifurcation" in social control policy, that is tough measures for serious violent offenders and soft measures for minor - especially property - offenders;

5) the symbolic functions of dangerous offender legislation (by enacting such legislation the government conveys the feeling that it is responding adequately to the fears of special interest groups and the general public).

The enactment of the 1977 Canadian Dangerous Offender Legislation illustrates particularly well the symbolic dimension of criminal legislation. The legislation, which has been little used since its enactment in 1977, was part of the "Peace and Security Package" that was designed to allay widespread concerns about the perceived increased dangers police, correctional officers and the general public would face with the abolition of capital punishment.

The concern of Canadian legislators with the dramatic impact of incidents involving offenders regarded as mentally disturbed and highly dangerous appeared to be a major factor in the retention of the dangerous offender section of the Peace and Security legislative proposals.

Similarly, the impact on the development of policy and legislation of highly dramatic individual incidents involving allegedly dangerous offenders can also be noted in other jurisdictions in the United States and Europe.

Although many critics have pressed for the abolition of dangerous offender legislation on the basis of research pointing to problems in assessing dangerousness, certain changes might be made in the legislation and in the dangerousness assessment process.

First, the statutory criteria for dangerousness might be more strictly defined. Only the most serious personal violent offences (outside of murder) should be part of the legislation's offence criteria.

Second, the legislation could be re-worded to remove vague imprecise terminology, such as the phrases "pattern of repetitive behaviour" and "indifference to reasonably foreseeable consequences", and unfounded assumptions such as the viewing of the "brutality of an offence" as an indication that individuals will be unlikely to inhibit their behaviour in the future.

Third, in the face of evidence that psychiatrists are no better at predicting future violence than other professionals, mixed composition assessment boards like those used in Sweden and Finland should be considered.

Fourth, a set of guidelines and standardized procedures for assessing dangerousness should be developed.

This study of dangerous offender legislation is intended not only as a comment on the present legislation in Canada but also as a case study of the policy-making process itself. By examining the origins, diffusion and use of dangerous offender legislation on a comparative basis we can be more aware of the constraints policy-makers and legislators face and the assumptions which guide their decisions.

INTRODUCTION

This report had its origin in 1976 in a request from the Solicitor General, Warren Allmand, for information on special legislative measures for dangerous offenders in jurisdictions other than Canada. A dangerous offender provision had been included in Bill C-83 (later Bill C-51) as part of the "Peace and Security Program" the Canadian government wished to institute as a replacement for capital punishment. A survey of legislation for dangerous persons in Europe and the United States carried out in response to the Minister's request led to some interesting questions: what were the origins of the different notions of dangerousness as used in legislation and Europe and North America and why and how had dangerousness legislation become so widespread in the face of longstanding criticism?

This report seeks to answer these questions with an emphasis on understanding how the 1977 Canadian dangerous offender legislation came into being.

Chapter One, examines some of the major meanings of dangerousness and its implications for the social control efforts of criminal justice and mental health agencies. Chapter Two examines the development in Europe of the social defence approach for the control of dangerous persons. Chapter Three examines the rise of special legal controls for dangerous offenders in the United States and Canada compares these measures with those used in Europe. Chapter Four examines criticisms of dangerousness legislation over the last

twenty-five years. In particular, it looks at the psychiatric assessments of dangerousness on which much of such legislation rests. Also discussed are recent attempts, in certain jurisdictions, to limit psychiatric influence while at the same time expanding the category of dangerous offender.

Chapter Five, explains why, despite the criticisms that have been made, the concept of dangerousness continues to be used and why some jurisdictions which have not previously had dangerous offender legislation are seeking to introduce it. Included here is an examination of some of the political and ideological implications of dangerousness legislation.

Chapter six examines briefly the relationship between policy-making and research on dangerousness in the context of the relationship between elected officials and the public.

The final chapter discusses the study's implications for legislation and policy in Canada.

CHAPTER ONE

DANGEROUSNESS AND SOCIAL CONTROL

In North America the term "dangerous offender" and its antecedents, the "criminal psychopath" or "sexual psychopath", evoke images of the most feared and loathed of offenders: the rapist, the aggressive pedophile, the mass murderer. Yet those likely to be designated dangerous offenders in American and European law do not always fit the stereotype of the depraved sex offender or crazed killer. The category dangerous offender includes a mixed lot, many of whom may not even be physically dangerous.

What policy-makers choose to define as dangerous in legislation (for example, violent offences against persons and sex offences) reflects: (1) the values and theories both of interest groups and of the general public, (2) the pressures -"real" or alleged - the general public and particular interest groups exert on policy-makers, and (3) prevalent ideologies of deviance and social control. Many highly dangerous acts (both willful and unwillful) such as pollution, shoddy manufacturing (Geis and Monahan, 1976; Shah, 1977:106-107; Shah, 1978:230-231), child abuse and neglect (Pfohl, 1977a), and drunken driving (Bottoms, 1977) are not specifically defined as dangerous in criminal or civil statutes. They are subject to controls much less stringent than those directed against many sexual or personal violence offences.

While the core notion of danger as "liability of exposure to harm, risk, or peril" (Fowler and Fowler, 1964:307) is clear enough in English and other Western European languages the term danger and its derivatives "dangerous" and "dangerousness" have been applied very selectively to certain kinds of acts and persons in civil and criminal law. Historically there have been three major contexts in which the notion has been used: civil mental health law, European positivist writings, and legislation for violent offenders.

The first major notion of "dangerousness" is associated with persons regarded as mentally ill and thus irrational, bizarre, or unpredictable in their actions in ways that may harm others or themselves. It is this notion of dangerousness which is the central to the mandate of the state to commit individuals for psychiatric treatment against their expressed will. The state's power in civil mental health law may be viewed as resting on a parens patriae (in the interests of the patient) mandate, a police powers mandate (that is, in the interest of the state or its citizens), or some mixture of the two. The focus of this study will be on confinements that occur under a police powers mandate. The focus will also be on criminal legislation or special legislation for alleged or convicted offenders rather than on regular civil mental health legislation. The issues associated with parens patriae commitments - such as the right to treatment or the right to refuse it - will not, except incidentally, be a concern.

The second major notion of dangerousness is based on nineteenth century European positivist doctrines of social control.

In much of continental Europe and Latin America the term "danger" and its derivatives took on a special meaning from the positivist doctrines of the nineteenth century (Petrunik and Landreville, 1979; Rico, 1979). According to these doctrines, habitual offenders, vagabonds, beggars, chronic drunks, mentally disordered offenders, and juvenile delinquents all could be said to be in l'état dangereux: a high risk of engaging in criminal or other anti-social activity. Although habitual offenders are considered to be in "l'état dangereux" in the positivist sense, they are not necessarily regarded as dangerous in the sense of their likelihood of committing sexual or violent offences. In addition, and in contrast with the various legal categories of psychopath, they are not necessarily considered to be mentally abnormal. Although the offences of "habitual offenders" are frequently of a petty variety, law-makers in many jurisdictions have regarded the persistent criminality of such individuals as a menace to society necessitating preventive confinement.

The third major conception of dangerousness refers to persons who pose a risk because of their alleged proclivity for violent offences or non-consensual sexual offences. Often such a proclivity is associated with some form of mental disorder or character disorder the person is alleged to have and thus is consistent with the first two usages noted. We shall see, however, that there are a number of instances, where there has been an attempt to separate the idea of proclivity for violence from that of mental or character disorder (see, for example, Peterson, 1973:156-157).

In considering these various notions of dangerousness, a look at the concepts of mental disorder, personality disorder and psychopathy[1] is important because these concepts are used along with that of dangerousness to establish special classes of persons subject to legal controls. Just as there has been considerable criticism of psychiatry's ability to diagnose mental and personality disorder - numerous works (Ennis and Litwack, 1974; Ziskin, 1979, Rosenhan, 1973, 1975) have pointed to the low validity and reliability of psychiatric diagnoses[2] - so too, has there been criticism of psychiatry's ability to assess dangerousness. There are great difficulties in predicting the occurrence of violent or sexual offences (and thereby designating certain persons as dangerous) because these events occur infrequently. Although one could argue that a few extreme cases lend themselves to relatively easy prediction, statistically rare or low

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1. The concepts of personality disorder or character disorder and the concept of psychopathy (often viewed as a form of character disorder) are controversial ones. A major point of contention is that such concepts simply reflect moral judgements in medical language. See Cirali (1978), Bleechmore (1975) and Hakeem (1958:668-676)

2. Stone (1975:65-66) qualifies this criticism by citing a number of studies indicating that the reliability of diagnosis is much higher for broad, inclusive diagnoses (for example, organic/psychotic/characterological or psychosis/neurosis/personality disorder) than for narrower diagnostic classes designating specific types of illness. There is also evidence that the more severe the "illness", the greater the diagnostic agreement.

base-rate phenomena are difficult, if not impossible, to predict without large numbers of "false positives" (persons incorrectly predicted to engage in the behaviour in question).[3] Even the most thorough evaluation studies (for example Kozol et al, 1972, 1975) have had well over sixty per cent false positives in their predictions. In contrast, the number of "false negatives" (persons incorrectly assessed as not dangerous) is small - in Kozol's study, 8.6 per cent.

Psychiatry's problems in diagnosing dangerousness have been further demonstrated in natural experiments in three states (New York, Massachusetts, and Pennsylvania) following the 1966 Baxstrom versus Herold Supreme Court decision resulting in the release of over 900 allegedly dangerous criminally insane persons to civil mental hospitals and later the community. Follow-up studies by Steadman and Cocozza (1974), McGarry and Parker (1974), and Jacoby (1976) found that few labeled too dangerous to release by psychiatrists were detected in acts of violence. Researchers (Steadman, 1974; Monahan and Cummings, 1975) have interpreted these studies as indicating that psychiatrists are too conservative in diagnosing individuals as dangerous.

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3. Designating someone as a false positive does not necessarily mean that he is "nondangerous". A false positive is only to be construed as non-dangerous in terms of the operational definition of violence or violent offence used in any particular study and the detection and formal registration of such offences. A "false positive" may thus have committed a "serious offence" without being convicted, arrested, recorded, or even detected in the first place. Physical violence or threats of it, particularly involving one's family, friends, co-workers or neighbours, may occur without being recorded, particularly when there is fear of retaliation should the incident become known.

Recently, there has been controversy over the use of psychiatric assessments of dangerousness in sentencing (or commitment) and release decisions. In the civil sphere, non-offenders judged to be mentally disordered and dangerous can be involuntarily committed to a mental health institution until they are judged to be well enough to be safely released. In the criminal sphere, courts use the legal notions of "competence", "sanity" and "insanity" (as well as the notions of "mental disorder" and "dangerousness") in decisions on preventive confinement and release.

All western societies have adopted standards to determine:

a) whether or not persons charged with a crime are incompetent to stand trial because mental disorder has allegedly rendered them incapable to participate in criminal proceedings;

b) whether or not persons are not guilty by reason of insanity because mental disorder has rendered them incapable of appreciating the distinction between right and wrong.

Individuals whom the courts find not fit to stand trial are at least temporarily exempt from a criminal sanction; those found not guilty by reason of insanity are permanently exempt for a criminal sanction. In many jurisdictions at least until recently[4] both categories were

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4. In the 1972 Jackson versus Indiana decision the United States Supreme Court ruled that persons found incompetent should be released unless there was a reasonable probability competency would be regained within the foreseeable future. In most jurisdictions in the United States, incompetents are no longer committed for life. There are usually upper limits and in some instances, such as New York, misdemeanor charges are dropped upon this finding and a 90 day maximum commitment is imposed.

automatically committed for life-indeterminate periods to psychiatric institutions. They were released only when the authorities decided they were well enough to be returned to trial, or were no longer a danger to others.

The decision-makers responsible for commitment and release appear to follow the assumption that such individuals are uniformly highly dangerous to others or themselves and should be confined in high security institutions to prevent the realization of this danger. Often individuals who are committed are confined longer than had they been simply convicted and not diverted to the mental health system (Ennis, 1972, Steadman and Cocozza, 1974, Quinsey et al, 1975a, b, and c), (Quinsey and Boyd, 1977).

Those who fall between the "normal", "sane" offender and those judged incompetent or not guilty by reason of insanity pose special problems. Civil mental health laws vary in their provisions for which classes of mental disorder and personality disorder are subject to involuntary commitment. In some jurisdictions, for example, "psychopaths" are subject to commitment; in others they are not. The legal standards for a finding of insanity in most societies (for example, the McNaghten Rules in Britain and jurisdictions following the British tradition) are regarded as applicable only for some of the violent offenders, non-violent sexual offenders and persistent offenders who might be judged as mentally abnormal by psychiatric standards and even civil commitment standards. To compensate for the gap between the criminal standards and civil involuntary

commitment standards, many jurisdictions have developed special preventive confinement measures in criminal legislation, special civil statutes, and hybrid forms which are in some ways "criminal" and other ways "civil" (Dershowitz, 1973, Stone, 1975). All involve a close interplay between criminal justice and mental health specialists, with the latter playing a role in both adjudication and release. The targets of these statutes are referred to by a variety of labels: "mentally disordered sex offenders", "mentally disordered violent offenders", "sexual psychopaths", "criminal sexual psychopaths", "sexually dangerous persons", "criminal sexual deviants", "psychopathic offenders", "psychopathic personalities" and "defective delinquents".

Individuals placed in these categories, although legally sane, are judged to have a mental disorder, personality disorder, or other deficiency in their makeup predisposing them to criminal or other dangerous offender. Such a diagnosis appears to stem from the belief that the involvement of these individuals in criminal or other forms of anti-social behaviour is compulsive and irrational. Violent offenders and sexual offenders tend to be judged as "sick" because of the strong abhorrence with which their acts are viewed and the belief that these acts are irrational.

At the very core of the question of identifying and controlling dangerous offenders is the issue of the semantics of dangerousness. The notion of danger and its derivatives "dangerous" and "dangerousness" as applied to offenders and their acts have been used

in three major ways in North America and Europe. The first usage refers to dangerousness viewed as a product of mental illness; people are regarded as dangerous precisely because their mental illness has made them "irrational" and "unpredictable". The second usage refers to the imputation of dangerousness to individuals because they have carried out or threatened acts of physical violence or strongly tabooed sexual offences. In this usage, the individual may be regarded as either fully responsible, and thus as "evil", or as having diminished responsibility because of some form of mental or character disorder. Contrary to the first usage where the emphasis is on the individual's disorder and consequent lack of responsibility the emphasis here is on the physical threat posed by certain individuals and the fear or abhorrence these individuals arouse. This fear and abhorrence are particularly marked when the offender is male and the actual or intended victims are women or children. The third usage is the most general and is that which the positivists mean with their notion of l'état dangereux. It refers to individuals believed to represent a persistent threat to society - however slight this threat may - because of their inherent physical or psychological make-up or even social circumstances. Such individuals are generally not regarded as mentally disordered.

In legislation, the first usage is that which most commonly characterizes civil legislation for the involuntary commitment of the mentally ill, although elements of the second and even third usage may

sometimes be found as well. The second usage is that which characterizes most special legislation for persons charged with or convicted of serious violent offences and non-consensual sex offences. The third usage is associated with legislation for habitual or persistent offenders.

The chapters that follow examine the rise and diffusion of the special dangerous offender legislation for violent, sexual and habitual offenders, its persistence in the face of heavy criticism, and some of the symbolic - largely "political" functions - which explain this persistence.

CHAPTER TWO

The Origins and Diffusion of Special Legal Controls for Dangerous Offenders in Western Europe.

This chapter examines the origins and diffusion of three major approaches to criminal control in Europe since the nineteenth century. They are the utilitarian reform, the positivist, and the social defence approaches.

> Prior to the eighteenth century, European penal policy tended to be based on principles of retribution and general deterrence and linked to a certain style of religious thought. It relied heavily on the elimination of the dangerous, by execution or transportation, and saw the protection of existing society and the punishment of wickedness as far more important than the rights of the accused. (Bottoms, 1977:74)

Public acts of torture and mutilation of the body (la supplice) were carried out both as symbolically befitting punishment for specific crimes and as an expression of the absolute authority of the sovereign (Foucault, 1979: chapters one and two).

Since the nineteenth century two ideal type approaches have predominated as the source of penal policy: the approach of the utilitarian reformers such as diBeccaria and Bentham (widely referred to as "classifical criminology") and the positivist approach. Various other approaches, such as social defense and general prevention (Andenaes, 1975), combine elements of the two approaches.

The era of the utilitarian reformers began in the latter part of the eighteenth century and continued well into the nineteenth. The reformers approach to social control, as expressed in such works as diBeccaria's On Crimes and Punishments (1974), was premised on the notions of free will, responsibility for criminal acts and omissions, and punishment proportional to the nature and seriousness of the crime. Utilitarian reform theory and its numerous variants or offshoots represented the emerging political philosophy of the Age of Reason; these theories emphasized equality before the law and protection of individual rights against potential state tyranny. This philosophy and the concern of legislators with the ineffectiveness and inappropriateness of la supplice, was clearly shown in the criminal code of France (1810) and most other penal codes enacted in nineteenth century Europe.

In the mid-nineteenth century, another shift began with the rise of positivism. The socio-political context in which positivist ideas took root was the widespread concern - in the face of economic crisis, political upheaval, and rapid social change - with the breakdown of social order (Foucault, 1975:77-80, Tulkens and Digneffe, 1979:8-9).

According to positivist thinkers, the human sciences, whether biology, psychiatry, or sociology, could be used to predict and control human behaviour and thus prevent social breakdown and bring about a better social order. The positivist approach to social control (Tulkens and Digneffe, 1979:10-15) was based on the conception that many forms of deviance could be construed as an expression of a

pathological state of individuals largely outside of their control. In contrast with utilitarian reform theory, with its view that most criminals were essentially no different from other human beings (that is, rational, hedonistic, responsible for their actions, and capable of being shaped by rewards and punishments), positivist theory viewed many criminals as of a different order of being; these "criminal types" required controls (punishment, treatment, or combinations of the two) which took into account their different makeup. Positivists considered the offender, more than the offence, to be the major concern of the state's organs of social control.

The social defence approach to the question of public protection and individual liberty that eventually developed at the turn of the twentieth century combined elements from the various nineteenth century schools of positivism with some of the elements advocated by the utilitarian reformers. The primary influences in social defence's development were the writings of the Belgian, Prins, the Dutchman, Van Hamel, the German, Von Lizt and the efforts of the Union Internationale de Droit Pénale they founded in 1889. The basic assumptions of social defence were: the origins of certain types of criminality in individual or social pathology, the notion of degrees of responsibility, the necessity to diagnose and incapacitate dangerous offenders, and the importance of preventing crime rather than simply reacting to it after the fact.

A key factor in social defence's rise was the development in civil law of the implications of the notion of risk for individual responsibility. These implications were transferred to criminal law

through the ideas of "criminal man" and "l'état dangereux". Foucault (1978:16, 17) argues:

> Just as one can determine civil liability without establishing fault ... by estimating the risk created and against which it is necessary to build up a defense..., one can render an individual responsible under law without having to determine whether he is acting freely and therefore ... [at] ... fault... by linking the act committed to the risk of criminality which his very personality constitutes. He is responsible since by his very existence he is a creator of risk, even if he is not at fault, since he has not of his own free will chosen evil rather than good. The purpose of the sanction will ... not be to punish a legal subject who has voluntarily broken the law; its role will be to reduce ... either by elimination, or by exclusion or by various restrictions, or by therapeutic measures - the risk of criminality represented by the individual in question. By bringing increasingly to the force not only the criminal as author of the act, but also the dangerous individual as potential source of acts ... one ... gives society rights over the individual ... not on what he is by statute, but ... what he is by nature....

The social defense theorists used the idea of "l'état dangereux" to advocate that social control measures should be proportional, not to the seriousness of the offence, but to the offender's "dangerousness" - his or her "capacity for and probability of doing harm" (Ancel, 1965:15). Acceptance of "dangerousness" as the basic grounds for social control also meant a change in the conception of the relationship between an individual's responsibility for an offence

and the sanction appropriate for an offence. "Abnormal offenders" who, from a utilitarian reform perspective, would be outside the ambit of criminal law, were to be subject to social controls on the basis of their dangerousness. Controls were to be: (1) non-punitive - "designed simply to neutralize the offender, either by his removal or segregation or by... remedial or educational methods" (Ancel, 1965:25); (2) indeterminate - not fixed in terms of estimates of the nature and seriousness of the crime. Custody and treatment for indeterminate periods were appropriate because a "disorder" whose treatment time could not be specified was involved (Ferri in Kittrie, 1971:37).

In short, for offenders designated as dangerous and disordered in mind or character, social defence theorists regarded the questions of the right to equality before the law, liberty, and due process as secondary to the state's duty to ensure public protection; the state, under the aegis of its police and parens patriae powers, had the right to confine and treat such offenders for periods of time beyond those otherwise set as appropriate for certain crimes.

With the diffusion of positivist and social defence ideologies of social control among policy-makers in the criminal justice and mental health realms in the latter part of the nineteenth and the early twentieth century, special controls for dangerous persons outside of the regular sentencing structure came into being. These usually took the form of indeterminate sentences for recidivists and various categories of mentally abnormal offenders such as "psychopaths".

France adopted the first special preventive confinement measure in 1885: a life sentence to to the French Guyana penal colony for recidivists.[5] Portugal (1892) and Argentina (1893) followed with similar measures. In 1905, New South Wales, Australia, introduced preventive confinement for recidivists; in 1908, England and Wales introduced its own special measure for recidivists[6] following the recommendations of the Gladstone Commission (Rennie, 1978:77).

Norway's 1902 Penal Code provided for two special security measures: etterforvaring, a measure extending the prison terms of "normal recidivists" regarded as too dangerous to release, and sikring, a treatment measure for "abnormal offenders" that the court found not responsible or only partly responsible for their actions. In 1929, this was modified to provide for special treatment and security measures for abnormal offenders and dangerous recidivist felony offenders (Antilla, 1975:3, Evensen, n.d.:9, 15, 21-22, Mathiesen, 1965: chapter 3).

Denmark introduced special preventive confinement legislation in 1925 and extended it in the 1930 criminal code revision into a complex system of sanctions for special categories of offenders based on imputations of "mental disorder", "dangerousness", and "susceptibility to the influence of punishment". The system consisted of:

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5. The relégation measure was subsequently modified in 1908, 1945, and 1948 and finally abolished in 1969. The more lenient forms of preventive confinement that were developed as alternatives to relégation (interdiction de séjour and tutelle pénale are little used today (Stefani et al, 1972: 506, 550-553).

6. This measure was amended in the 1958 Criminal Justice Act and replaced with the extended sentence in 1967. Special measures for mentally disordered offenders called hospital orders were introduced in the Mental Health Act of 1959.

1) indeterminate preventive confinement for "normal" but dangerous recidivists;
2) indeterminate preventive confinement for criminal psychopaths not deemed susceptible to the influence of punishment;
3) a determinate sentence for psychopaths considered susceptible to influence by punishment; and,
4) indeterminate commitment for offenders found not liable to punishment because of mental disorder or other states of mind rendering them non-responsible for their actions (Denmark, Ministry of Justice, 1974:19-24, 1975:18).

Sweden introduced special preventive confinement legislation for recidivists in 1925: forvaring for "abnormal offenders" and internering for "normal recidivists". A decade later, "surrender for special care" replaced forvaring; offenders the Court judged as mentally disordered were placed under inpatient or outpatient psychiatric care or care by an Agency operating under the jurisdiction of the Social Welfare Board (Antilla, 1975:6-7; Moyer, 1974). It has been estimated (Sansone, 1976:74; Serrill, 1977b:19) that a high proportion of violent offenders (for example, sixty to seventy percent of those found by the Court to be "murderers") are handled under this special provision.

In 1925 and 1928, the Netherlands introduced special measures for dangerous offenders providing for various combinations of normal penal sentences, a special indeterminate sentence at the pleasure of the government known as (T.B.R.) and commitment to a psychiatric institution (Detention at the Government's Pleasure, n.d.: 1,2).

Belgium's 1930 social defence law provided for indeterminate confinement for mentally abnormal offenders and recidivists; it was modified to its present form in 1964 (Tulkens and Digneffe, 1979:18). Italy's 1930 social defence measure provided for the indeterminate confinement of the "socially dangerous": mentally disordered offenders, habitual offenders and professional offenders (Tulkens and Digneffe, 1979:17). In 1932, Finland introduced special preventive confinement legislation for dangerous recidivists; it was amended in 1953 and 1971 (Anttila, 1975; Joutsen, 1977; Zagaris, 1977).

In Germany, a 1933 law provided for indeterminate confinement in a psychiatric hospital for the criminally insane and preventive confinement in a penal institution for habitual offenders and dangerous sexual offenders. As in Italy and The Netherlands, offenders judged to be psychopaths were subject to both a determinate prison sentence and an indeterminate preventive confinement sentence (Tulkens and Digneffe, 1979:20).

In 1933 Spain enacted its Vagos y maleantes measure. Vagrants, beggars, pimps, chronic drunks and others considered to be social nuisances could serve up to three or five years in work camps, houses of surveillance or disintoxication centres.

To sum up, the social defence approach which emerged from the conflict between the utilitarian reform and positivist approaches has been the major approach to social control in Western Europe in the twentieth century. The utilitarian reformers viewed criminals as

essentially rational beings to be held accountable and punished in manner proportionate to the nature and seriousness of their crimes once these crimes were shown to be a product of free will. The positivists viewed criminals as beings with a pathology which predisposed them toward criminality. Because criminals were viewed both as responsible for their crimes and a menace to society, they had to be confined as long as necessary for society's protection and, if possible, treated to eliminate or reduce their criminal tendencies. The social defence approach viewed criminality as best dealt with in terms of a continuum with individuals at differing levels of rationality and responsibility for their actions. Acceptance of the social defence approach resulted in the introduction of special measures (generally indeterminate and combining punishment and treatment) for individuals judged to be partially responsible for their actions and dangerous to society. These measures were the beginning of dangerous offender legislation in Europe as distinct from civil confinement of the allegedly dangerous mentally ill.

CHAPTER THREE

The Origins and Diffusion of Special Legal Controls for Dangerous Offenders in the United States and Canada

Introduction

In the United States and Canada the notion of dangerousness and the use of indeterminate confinement for "dangerous persons" and "dangerous offenders" has only tenuous links with the notion of "l'état dangereux" in Continental Europe.[7] The North American conception of the dangerous offender is primarily based on beliefs about the violence and unpredictability of mentally disordered persons and the association of certain offences involving sex and violence with mental disorder (Scheff, 1966, Greenland, 1978).

Legislation providing for indeterminate confinement for the allegedly dangerous mentally ill and the criminally insane in the United States and Canada has its roots in the British common-law tradition and pre-dates positivist and social defence rationales. In

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7. Mannheim (1955:209), for example, writes: "American discussions of the psychopathic sex offenders laws seem to contain no reference to, and show no awareness of, that much older and more general European controversy".

the United States, indeterminate sentences for "normal offenders" were proposed by Benjamin Rush as early as 1787 and advocated formally by the American Prison Assciation at the Cincinnati Congress in 1870, six years before Lombroso's "L'Uomo Delinquante" was published (Barry, 1958: 187-231, Hahn, 1978: 120-122).

The origins of special social control measures for dangerous persons in the United States lie more in the defective delinquency and criminal psychiatry movements[8] than in European-style positivism (Hahn, 1978). Although these movements were influenced by European developments they have distinct American antecedents, for example, the writings of the early American psychiatrists Benjamin Rush and Isaac Ray (Rieber and Vetter, 1978) and the Social Darwinists and eugenicists such as Dugdale (Hahn, 1978, Rennie, 1978).

The United States

The Early Defective Delinquent Statutes

Early defective delinquent legislation (for example, the 1911 Briggs Statute in Massachusetts, the 1921 New York Statute, and the

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8. Influential in the rise of this approach were such psychiatric authorities as Healy (1915), Glueck (1925), Alexander and Staub (1929), Menninger (1928) (1963), Noyes (Kolb, 1968), and Guttmacher (1963). See in particular (Hahn, 1978:Ch. VII:340-390, "The Clinic Movement), Lejins (1978), Robitscher (1978), and Rieber and Vetter (1978).

1937 Pennsylvania Statute) was based on popular genetic theories of criminality; it was concerned with incapacitating - through confinement - intellectually or morally deficient offenders (Hahn, 1978:275, Kittrie, 1971:178). Such legislation was enacted in ten states (Duke Law Journal, 1958: 80-81).

The 1915 report of the Hebberd Commission "to investigate provision for the mental deficient" in New York State explicitly evoked "the image of the feeble-minded as potentially dangerous degenerates".

> Feeble-mindedness is a grave social menace. To it can be attributed a very definitive proportion of the vice, crime and degeneracy that tend to destroy the peace and prosperity of our communal life. Not only is it a fundamental cause of misery, but it possesses the quality of hereditary transmission, thus ensuring the continuance of misery through the generations to come. (Hahn, 1978: p. 413)

The 1921 New York law resulting from the Commission's work stipulated that persons, sixteen years or over, convicted (or simply accused) of a crime and declared mentally defective by two qualified examiners could be incarcerated indefinitely at Napanoch prison until the Director "found reasons for... discharge" (Hahn, 1978:2). In 1931 the law was restricted to those convicted of a crime, but it was not until 1966 that the law was abolished. Massachusetts, the last state to have such a law, abolished its defective delinquent statute in 1971.

The Habitual Offender Statutes

American habitual offender laws date back to the colonial

practice of applying harsher sanctions to recidivists; the grounds were that repeat offenders required greater deterrents and more severe punishment than first offenders.

Around the turn of the nineteenth century, laws for recidivists were enacted in several states. In New York, for example, a 1797 law provided for life imprisonment for a second felony. An 1817 Massachusetts law provided that:

> Where a person is again convicted of a crime punishable by hard labor, in addition to the penalty for the crime, he shall have thirty days solitary confinement and seven years added to the penalty; for the third offence, he shall have the same term of solitary confinement and shall be in prison for life (Brown, 1945, p. 641).

The first wave of special habitual offender laws followed the recommendations of several crime commissions in the 1920's. New York State's 1926 Baumes "Public Enemy" Law, which prescribed mandatory life imprisonment following the fourth conviction for a felony, was the prototype for these laws; it was a direct influence on legislation in several other states including Oregon, Florida, North Dakota, Minnesota and Vermont. Eventually, after numerous challenges, habitual offender laws were enacted in all but eight states (Brown, 1945:142).

Dinitz and Conrad (1978:121) sum up the current status of these laws:

> In general, these laws vest authority to invoke the statute in the prosecutor, with or without court approval. In a minority of states, no such specification exists. However invoked, the essence of all such codes is an added penalty based on a proved record of prior offences. The enhanced penalty ranges from some multiple of the usual sentence, for example, twice, three or more times as long, life, or a specified number of years such as 99. Occasionally an

additional penalty is provided; in Washington and West Virginia, habitual offenders may be sterilized. These enhanced penalties generally apply to felony offences, whether or not violent. In general, too, the number of prior convictions needed to activate the statute is one or two; three is less common and four is required in only one state.

The Psychopath and Later Defective Delinquent Statutes

The civil (or quasi-criminal) psychopath, defective delinquent and kindred statutes enacted in the 1930's, 40's, and 50's, deal with legally sane but mentally disordered or character-disordered offenders, especially sexual offenders and violent offenders.

Michigan enacted the first sexual psychopath statute in 1937 as an amendment and addition to its Criminal Code; the statute was declared unconstitutional, however, on the grounds of double jeopardy and failure to provide for a jury trial.

States subsequently introducing sexual psychopath measures (of which Illinois was the first in 1938) circumvented the due process requirements of criminal law by declaring their statutes to be civil measures comparable to those for the sterilization of mental defectives and the commitment of juveniles and the mentally ill (Rutgers Law Review, 1966: 756-757; Brakel and Rock, 1971: 346-347). Legislators argued that such measures were not circumscribed by the constitutional and statutory protections for persons charged with a crime (Brakel and Rock, 1971: 346-347). Increasingly, however, as a

consequence of the civil rights movement the statutes enacted have become hybrid civil/criminal measures with many of the procedural safeguards of criminal proceedings being introduced.[9]

The rationale for both civil controls and indeterminate confinement was based on American forensic psychiatric theory.

> Psychologists, sociologists, and jurists [more generally, psychiatrists] have advocated the abandonment of traditional punitive measures of the criminal law as ineffectual in dealing with these individuals since the source of the threat they represent resides in a form of mental illness. The theory has developed that these non-deterrable offenders should be segregated until it has been determinated that it is reasonably safe to terminate their confinement - that the emphasis should be on the general security of society and the advantages of individualized treatment. The implementation of such a program requires a truly indeterminate sentence, because it is impossible to predict the length of time necessary for reform (Rutgers Law Review, 1966: 756-757).

Sleffel (1977:41) notes the following characteristic features of sexual psychopath statutes:

1. They are based on a definition ("sexual psychopath", "psychopathic offender", "mentally disordered sex offender", "criminal sexual deviant", or the like) involving mental abnormality or deficiency, coupled with propensities for the commission of sex offences or other offences, and often including mention of danger to other persons.

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9. Dershowitz (1973:1295-1307) refers to this phenomenon as the civil/criminal labeling game. Stone (1975:179-198) calls the sexual psychopath statutes "quasi-criminal" statutes.

2. They provide for commitment, often indeterminate, to a mental hospital or special treatment facility.

3. They rely more on a psychiatric diagnosis of the subject's mental status than on usual criminal fact-finding procedures focusing on the act that constituted the crime.

4. The stated emphasis of the confinement is therapeutic rather than punitive, and release is conditioned more in improvement in the subject's condition or a decrease in his dangerousness as assessed by medical or psychological staff than on expiration of a period of time specified by the court.

In the 1940's and 1950's social movements spearheaded by psychiatrists and concerned citizens led to the enactment of psychopath laws in over thirty states. [10] The "moral entrepreneurs" (Becker, 1963) calling for such legislation, aided by sensational newspaper and magazine stories and public hysteria - claimed that:

1) sex offences were on the increase,

2) sex offenders tended progressively to move on to more serious sex offences, and

3) the mental or character disorders and dangerousness of sexual offenders necessitated maximum security custody and psychiatric treatment until a cure was effected.

Tapan (1950), Sutherland (1950a and 1950b), and Levy (1951), have described the rise and diffusion of the sexual psychopath statutes and the role of psychiatric interest groups in this process. Sutherland (1950b) noted:

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10. For a discussion of this phenomenon in general, see Sutherland (1950a, 1950b), Levy (1951), and Tappan (1950 in Brooks, 1974). For the specific case of Massachusetts, see Kozol (1972:375-376). For Maryland, see Hoffman (1977:171-174).

> The sexual psychopath laws are consistent with ... a ... general social movement toward treatment of criminal as patients ... (p. 299). Not only has there been a trend toward individualization in treatment of offenders, but there has been a trend also toward psychiatric policies. Treatment tends to be organized on the assumption that the criminal is a socially sick person; deviant traits of personality regarded as relatively permanent and generic are regarded as the causes of crime (p. 287).

Amendments in the 1950's and 1960's, however, reflected more clearly the public protection concerns as opposed to concerns for psychiatric treatment. Although the concepts of the "dangerous person" and the "dangerous offender" frequently replaced that of the "psychopath", for example in Massachusetts and Illinois, the statutes remained substantially the same.

The second form of defective delinquent statute, exemplified by the Maryland statute of 1951, was a hybrid of the earlier type of defective delinquent statute and the sexual psychopath statutes. This legislation and some of the other special statutes not specifically tied to sexual offences, such as Ohio's Ascherman Act (Pfohl, 1978), generally meet the same requirements noted by Sleffel with the exception of a greater emphasis on the incapacitation of offenders, than their treatment. The Maryland law, for example, stated that a defective delinquent:

> ...shall be defined as an individual who by his demonstration or persistent aggravated antisocial or criminal behavior evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional imbalance, or both as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment (Sleffel, 1977 p. 78).

The statute's emphasis on incapacitation is particularly clear from this statement in the 1947 legislative report which recommended its enactment.

> The primary purpose of such legislation is to protect society from this segment of the criminal population who probably will again commit crimes if released on the expiration of a fixed sentence; and thus they should be detained and specially treated unless and until cured... If they cannot be cured, such indeterminate sentence accomplishes their confinement for life, which the protection of society demands... The treatment may, and in many cases would, involve incarceration for life... not because of guilt but to protect the defective himself and society (State of Maryland, 1973:1).

The Maryland Defective Delinquent Statute remained without significant change until 1977 when, after repeated attacks by civil libertarians, the provision for a life-indeterminate sentence was abolished (Serrill, 1977c).

Canada

Canada first enacted special controls for dangerous offenders in the late 1940's in the form of measures for habitual offenders and criminal sexual psychopaths. The primary aim of these measures was the incapacitation of the offender; no specific reference is made to treatment in any form. (Petrunik and Landreville, 1979: 12-14).

Habitual Offender Legislation

The 1947 Canadian Habitual offender measure provided that persons convicted of an indictable offence could be sentenced to preventive detention for a life-indeterminate period (in lieu of the sentence for the offence for which they were convicted) if they were found to be a "habitual criminal" from whom the public should be protected. A "habitual criminal" was defined as a person who

> has previously, since attaining the age of eighteen years, on at least three separate and independent occasions been convicted of an indictable offence for which he was liable to imprisonment for five years or more and is leading persistently a criminal life... (Ouimet, 1969:242)

The Habitual Offenders Act of 1947 had been recommended by a royal commission which had studied social defence measures for recidivists used in Europe (Archambault, 1938); the direct model for the Canadian legislation was the 1908 England and Wales Prevention of Crime Act. Ironically, this much criticized English statute underwent a major revision the same year the Canadian law came into effect resulting in a change from a life indeterminate sentence to a five year minimum/fourteen year maximum sentence (Ouimet, 1969:245).

The Criminal Sexual Psychopath Act of 1948 had a dual heritage. Although it closely reflected the philosophy, language, and concerns of the Habitual Offenders Act (Tremblay, 1978), it borrowed its definition of criminal sexual psychopath from the 1947 Mssachusetts law which in turn was based on a Minnesota definition approved by the United States Supreme Court in 1939. In addition, comments made by Canadian members of parliament during the debate on the Habitual Offenders statute (Hansard, July 3, 1947:5031, 5033-5034) and the debate on the Criminal Sexual Psychopath statute (Hansard, June 14, 1948: 5195-5199)[11] indicated concerns about sex crimes similar to those expressed by the advocates of sexual psychopath laws in the United States:

The 1948 law defined a criminal psychopath as:

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11. On July 3, 1947, Mr. Green, Member of Parliament for Vancouver South noted the "alarming increase in Canada in moral offences against children". He indicated that a number of petitions had been made in his province calling for government action and read into the record a detailed request by a Parent-Teachers Group for a special measure parallelling the American Sexual Psychopath Measures. He inquired why such a measure had not been included in the amendments being considered at that time.

    On July 14, 1978, following the Proposal for Criminal Sexual Psychopath Legislation, Mr. Diefenbaker provided a commentary quite consistent with the concerns behind the sexual psychopath statutes in the United States. He stated: "In my opinion, this provision represents the first actions on the part of the parliament of Canada to meet a type of offence that is becoming general; a type of offence that creates fear in the minds of mothers and fathers of children who, by reason of residence in cities, are brought into close contact with strangers. Out of this legislation, with psychiatrists receiving training, ultimately I believe this section will have the effect of punishing wrongdoers and protecting the public at large, and I also believe that eventually it will restore many of these wrong-doers after treatment, to a place in society wherein they may contribute something to the welfare of the country, instead of being chronic recidivists whose crime ends only with their lives".

> a person who by a course of misconduct in sexual matters and evidenced a lack of power to control his sexual impulses who as a result is likely to attack or otherwise inflict injury, loss, pain or other evil on any person (McRuer, 1958:13)

Upon application by the Crown and at least seven days notice, a hearing under criminal standards of evidence could be held in the case of persons convicted of attempted or actual indecent assault on a male or female, rape, or carnal knowlege. At least two qualified psychiatrists, one of whom was appointed by the Minister of Justice, were required to testify on the question of the accused's status.

A person found to be a criminal sexual psychopath was required to serve a sentence of at least two years imprisonment for the crime fr which he had been convicted plus a life-indeterminate term under preventive detention in a penitentiary (McRuer, 1958: 12-13). The Minister of Justice was required to review each case at least once every three years to determine whether or not the person should be placed on parole and, if so, on what conditions (McRuer, 1958:13).

In 1953, Parliament revised the statute to include actual or attempted buggery, bestiality or gross indecency (McRuer, 1958:12) in the list of offences which could result in a criminal sexual psychopath hearing. It was not until 1960, as we shall see in the following chapter, that the criticisms of the McRuer report resulted in the removal of the term criminal sexual psychopath from the statute.

It should be noted that the development of controls for dangerous offenders in the United States and Canada only partially reflected the use of the social defence approach in Europe. In both

Canada and the United States the concern has primarily been with sexual offences (notably persons charged with rape, homosexual offences, or any sexual offences involving children) and only secondarily with violent non-sexual offenders. In the United States legislation has been strongly shaped by forensic psychiatric theory and by developments in civil mental health legislation. In Canada, legislation reflected the dual influence of European habitual offender measures and the wave of American sexual psychopath laws in the 1940's. In both the United States and Canada the psychiatric role in these special measures was virtually unchallenged until the 1960's and the 1970's.

CHAPTER FOUR

Psychiatry and the Identification and Control of Dangerous Persons: A Critique

Over the last two decades there have been increasing attacks on the ability of psychiatrists to diagnose and treat mental disorder and predict dangerousness. While there were some notable earlier criticisms (Sutherland, 1950a, 1950b; Hakeem, 1958; Szasz, 1961, 1963), the major developments did not begin until the late 1960's, with the civil rights movement, consumer advocacy, and human science all playing a part (Robitscher, 1977, 1978). Rather than just arguing for or against psychiatric authority and competence, psychiatrists and their critics began to call for objective evidence. Halleck (1969:11), noted:

> Research in the area of dangerous behavior (other than generalizations from case materials) is practically nonexistent. Predictive studies which have examined the probability of recidivism have not focused on the issue of dangerousness. If the psychiatrist or any other behavioral scientist were asked to show proof of his predictive skills objective data could not be offered.

In Europe, evaluation studies of programs for special offenders (Morris, 1951; Hammond and Chayen, 1963; Evensen, n.d.; Moyer, 1974; Bishop, 1975) indicated that generally only petty, nondangerous offenders were sentenced to special preventive confinement. Research

also showed special indeterminate measures ineffective in reducing recidivism. Christiansen et al (1972), for example, found no significant difference between the recidivism rates of allegedly dangerous psychopaths discharged from Herstedvester and those of inmates discharged from the special prison at Horsens and other Danish state prisons with one exception. Offenders released from Herstedvester had, on the average, been reconvicted after a longer interval than those released from other institutions (Bishop, 1975:91).

As part of a general reaction against forensic psychiatry in Denmark (Svendsen, 1977) the special system of controls for recidivists and dangerous offenders established in 1930 was drastically revamped in 1973 and 1975. Of the five previously existing measures, only an amended form of the forvaring preventive confinement measure remains and its use is now rare. Individuals are no longer directly sentenced to the institution for psychopaths at Herstedvester.[12] They are transferred there from ordinary prisons and treatment is on a voluntary basis.

In Finland, the use of preventive confinement decreased sharply following the 1971 legislative amendments. (Antilla, 1975; Joutsen,

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12. Herstedvester obtained international recognition through the innovative program of its former director Dr. George Stürrüp. Stürrüp supported the indeterminate sentence arguing that the release of mentally ill offenders should only be based on their progress in therapy. He left in 1972, shortly before the enactment of the new legislation, bitter over attacks on his program (Stürrüp, 1968, 1976; Serrill, 1977a:42).

1977). A Finnish Ministry of Justice Committee (1976: 68-69) has recommended the abolition of all indeterminate sanctions on the grounds that they are often imposed arbitrarily and that they produce severe anxiety in inmates.[13]

In Norway, (N.O.U., 1974) and Sweden (S.O.U., 1977), inquiries have recommended moves similar to those that have occurred in Finland and Denmark.

In the United States there have been attacks on both habitual offender and psychopath statutes.

Critics have characterized habitual offender statutes as unwieldy and unjust. Brown (1946:66) noted: "In the Baumes Law, as in the cases of other types of severe mandatory legislation, the courts rebelled. This has been the customary reaction of courts to such legislation.... Most of these statutes have remained inoperative". Sleffel (1977:18) adds that, in addition to the opposition of the courts, these laws were regarded as unworkable because their application frequently resulted in long and costly trials that could only be practically resolved through plea bargaining.

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13. See, however, Gordon (1977:f.n. 11, 246-247) for a more positive view of the anxiety-including effects of the indeterminate sentence.

Criticism of the sexual psychopath and defective delinquency laws was part of a civil rights and consumer advocacy explosion in the area of mental health in the 1960's spawned in part by the writings of critics of psychiatry such as Szasz (1961, 1963), and Scheff (1966).

Initially, the greatest developments occurred in the area of involuntary civil commitment statutes for the mentally disordered. The major issues have been the lack of due process safeguards despite a "massive curtailment of liberty" (Harvard Law Review, 1974:1201), the right to treatment, and the right to refuse treatment.[14] The issue of the assessment of dngerousness became a major one following the 1966 Supreme Court decision in the Baxstrom case and the several follow-up studies of the persons released as a consequence of the

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14. The trend, at least in the United States, is toward a more frequent and more restrictive use of dangerousness as a criterion for involuntary commitment on the grounds that the State does not have the authority, under the constitution, to confine persons who are not demonstrably dangerous based on claims that such persons require treatment and custody by virtue of their mental disorder. A major challenge to parens patriae commitments, and a factor in the advocacy of the dangerousness criterion as the single or major criterion for involuntary commitment, has been the notion of a "right to treatment". The essence of this notion is that persons involuntarily confined on the basis of a diagnosis of mental or character disorder rather than for a criminal conviction (i.e., persons found to be not guilty by reason of insanity, incompetent to stand trial, or sexual psychopaths), have a constitutional right to treatment as opposed to simply custodial care. Failure to provide the treatment promised or implied by a statute has in a number of landmark cases led confinement to be viewed as punishment and hence to be illegal. For useful discussions on the tendency toward the use of the dangerous criterion in civil mental health legislation, see Harvard Law Review (1974:1205, 1222-1223), Wald and Friedman (1978:144-145), and more generally, Pfohl (1975).

court's decision (Steadman and Cocozza, 1974). Claims of the low validity and reliability of all forms of psychiatric diagnosis (cf. Pfohl, 1978b: 15-20), criticisms of the ineffectiveness of psychiatric treatment in both mental hospitals and prisons, and the charge that dangerousness could not be reliably assessed, resulted in successful attacks against indeterminate preventive confinement for dangerous offenders in several American states. In 1977, indeterminate detention for "defective delinquents" in Maryland (Burrill, 1977c) and "mentally disordered sexual offenders" in California (Reid, 1977), was abolished. The defective delinquent treatment program at Maryland still exists, but as is the case with Herstedvester in Denmark, now operates on a voluntary basis.

In Canada, the report of a royal commission chaired by Justice McRuer strongly criticized the criminal sexual psychopath section of the Criminal Code. Many critics cited in the report felt the term "criminal sexual psychopath" was vague and unscientific. Some expressed concern over the difficulty of obtaining convictions under this section of the Code, noting that only thirty-three persons were sentenced under the statute between 1948 and 1955. Some also felt the high standard of proof required - "criminal" as opposed to "civil" - meant that many sexual offenders could only be confined for definite terms under the regular sentencing structure and would thus constitute a danger on release. McRuer (1958:15)

In response to the McRuer report, Parliament dropped the term "criminal sexual psychopath" in 1960 and replaced it with the term "dangerous sexual offender" (D.S.O.): a person who "by his conduct in

any sexual matter, has shown failure to control his sexual impulses, and who is likely to cause injury, pain or other evil to any person through failure in the future to control his sexual impulses or is likely to commit a further sexual offence" (Greenland, 1976:272).

The primary aim of the amendments was to make adjudication as a dangerous sexual offender easier by:

1. making it clear that dangerous sexual offender hearings could be held in the case of individuals with only one conviction who appeared to be highly dangerous on the basis of their personal history and the circumstances of their offence.
2. changing the requirement of proving the offender's lack of power to control his sexual impulses to his failure to do so.
3. changing the phrase "inflict injury" to "cause injury" - a phrase with a broader meaning.

Parliament also made other important changes. First, a person found to be a dangerous sexual offender was no longer sentenced to a determinate period to precede the indeterminate one, but to an indeterminate period only. Second, the period of time to apply to have a person declared a dangerous sexual offender was extended to three months after conviction, providing the sentence was still in

effect. Third, the federal Department of Justice was obliged to review each case annually rather than ever three years.

The 1967 Wilband versus the Queen decision introduced an important qualification to the meaning of the D.S.O. section by allowing involuntarily obtained evidence in a D.S.O. hearing. The grounds were that the issue is not what the person being tried did and hence whether or not that person should be convicted of another offence, but solely whether or not that person is afflicted by a condition rendering him or her a dangerous sexual offender. (Price and Gold, 1976:236, f.n. 140).

Another major change occurred following the 1967 Supreme Court decision in Klippert versus the Queen. Klippert had been found to be a dangerous sexual offender after conviction on four charges of gross indecency, preceded by a conviction for gross indecency five years earlier. All the offences were apparently consensual; there was no indication Klippert was physically dangerous. Klippert appealed, contending that although he might - because of his personality makeup - engage in further sexual offences, these were likely to be with consenting adults; he was not likely to "cause injury, pain or other evil". The conviction, however, was upheld by the Supreme Court of Canada, on the basis that the "further offence" need not be one which would "cause injury, pain or other evil".

Although Klippert's appeals were unsuccessful, his case became something of a cause célèbre. The Klippert case, along with other developments such as the diffusion of the findings of Britain's

Wolfenden report, led to amendments of the Criminal Code abolishing liability for homosexual activity between consenting adults in private. In addition, an amendment to the dangerous sexual offender section of the Code struck out the words "or is likely to commit a further sexual offence" which had been a major consideration in the Court's decision to rule against Klippert's appeal (Price, 1976:2187, f.n. 40, Greenland, 1976: 273-274).

The Committee on Canadian Corrections report (Ouimet, 1969) noted that the application of the Habitual Offender Legislation was uneven across Canada and it was used largely for property offenders who were of little threat to the personal safety of others. Regional disparities were particularly pronounced. In 1968, of the eighty persons being held as habitual offenders, forty-five had been sentenced in British Columbia and thirty-nine of these in one city, Vancouver. Only six had been sentenced in Ontario, only nine in Quebec (Ouimet, 1969:257).

The Ouimet Committee also criticized the D.S.O. legislation on the basis of regional disparities in its application: a disproportionate number of those convicted, fifteen out of forty-seven, came from the Vancouver area.

The Committee pointed as well to: (1) the difficulty in determining an individual's dangerousness on the basis of a brief psychiatric interview (as opposed to a psychiatric remand for thirty to sixty days); (2) the legislation's inclusion of persons who were not physically dangerous; and (3) the failure, of the legislation to include dangerous non-sexual offenders (Ouimet, 1969:258).

The Committee recommended the appeal of both the Habitual and Dangerous Sexual Offender Statutes and their replacement with a dangerous offender statute along the lines recommended by the Model Sentencing Act in the United States (N.C.C.D. Council of Judges, 1963).

The Ouimet Committee, however, retained the medical-psychiatric perspective behind the original criminal sexual psychopath statute. They saw the legislation as appropriate for:

> the offender who is suffering from a severe personality disorder which causes him to be dangerous in terms of the physical safety of others.... The punitive or deterrent aspect of sentencing is absent in the case of the offender who is dangerous because of a character or personality disorder (Ouimet, 1969:265).

The Committee recommended an indeterminate sentence contingent "upon the existence of necessary custodial and treatment facilities appropriate for this class of offender" (Ouimet, 1969:263). The Committee also put further the view, in keeping with a medical-psychiatric model, that sciences such as biology and chemistry would in the foreseeable future, assist in the development of methods for identifying and treating the dangerous offender (Ouimet, 1969:264).

An important development favouring a medical psychiatric approach to dangerousness was the establishment in 1971, by the Solicitor-General of Canada, of an Advisory Board of Psychiatric Consultants. This Committee chaired by Dr. Rhodes Chalke consisted of the most prestigious forensic and correctional psychiatrists across

Canada. It was given the mandate to review federal correctional psychiatric services throughout Canada and make recommendations on how they might be improved. A special sub-committee of the board reviewed issues relating to dangerous sexual offenders and their custody and treatment. From 1971 to 1973 when they issued their report (Solicitor General of Canada, 1973) the members of the Board worked closely with senior officials of the federal Solicitor General's department. Records of their meetings and consultations (Koz, 1971-73, Koz 1971-73) reveal a strong adherence to conventional medical psychiatric concerns with regard to dangerousness; few references are made to the concerns about prediction and civil rights beginning to be strongly expressed in the social science and legal literature at the time.

Although the Advisory Board of Psychiatric Consultants did not directly address the issue of dangerous offender legislation in their 1973 report, their contacts with the Solicitor General and senior Ministry officials did create a climate favouring the kinds of recommendations with regard to dangerousness put forth by the Ouimet Committee. When literature critical of the psychiatric perspective toward dangerousness was later cited by the Policy Branch and Research Division of the Solicitor General's Department, it did not have much impact on the Ministers and senior officials of the Solicitor General and Justice Departments perhaps because the psychiatric perspective had already been "legitimated" by the reports of prestigious groups such as the Ouimet Committee (1969), the Canadian Mental Health Association (1969), and the Advisory Board of Psychiatric Consultants (1973). The link between the Advisory Board's report and possible dangerousness legislation was made in a paper by Desroches (1973: 215-216).

> The plan to build regional psychiatric centres for mentally disordered inmates might well be the tip of an iceberg signalling greater dangers underneath... T he possibility exists that the federal government will enact indeterminate dangerous offender' legislation on the ... premise ... that these new facilities will treat inmates and release them when they are cured.

Ericson (1974) has also pointed to problems with the Advisory Committee's recommendations and the manner in which they complemented the Ouimet Committee's recommendations on dangerousness.

The next government report dealing with dangerousness, the 1974 report of the Senate Committee chaired by Senator Goldenburg, basically followed the Ouimet Committee's recommendations in calling for dangerous offender legislation to replace the habitual and D.S.O. measure. This Committee included, however, the possibility of sentencing individuals involved in organized crime as dangerous offenders. It also treated "propensity toward violence" as a factor to be considered by the court, not as a criterion for finding someone a dangerous offender (Goldenburg, 1974).

In 1975 the National Law Reform Commission's working paper on imprisonment used the notion of dangerousness but contended that the indeterminate sentence was inappropriate. The Commission recommended that dangerous offenders be sentenced under the regular sentencing structure. Individuals found to be dangerous offenders on the basis of conviction for a "serious offence that endangered the life or personal security of others" would be eligible for a proposed maximum twenty year separation sentence. Noting both the false positive problem and the real (if empirically rare) problems of repeat violent offenders and participants in organized crime, the Commission

recommended dangerousness be determined on the basis of careful consideration of the offender's prior record, personality, pre-sentence report, and "expert opinion" from the behavioural sciences.

In addition to reports from government commissions, a number of research studies pointed to deficiencies in the Canadian preventive detention legislation. Klein (1973) pointed to problems in the habitual offender measure resulting from its use to encourage plea bargaining. Studies by Marcus (1971), Greenland (1972), and Desroches (1972) documented the situation of the "dangerous sexual offender" in Canadian penitentiaries. Marcus examined the stigma attached to sexual offenders and its negative consequences for their self-images. DesRoches documented the brutal slaying of sex offenders during the 1971 Kingston riots. Greenland (1972) studied seventeen D.S.O.s incarcerated in Ontario penitentiaries and found that only three had been involved in offences of physical violence. He concluded that the D.S.O. legislation as written and practised offered no real protection to the Canadian public and was in fact a source of harm.

> The real problem in Canada, as in other jurisdictions, is that the public are being cruelly deceived into believing that the law protects them and their children from assault by vicious sexual criminals. Dangerous sexual offender legislation does nothing of the kind. What it does - often in a mockery of justice - is to give the public a false sense of security by incarcerating, virtually for life in conditions of appalling degradation a pathetic group of socially and sexually inadequate individuals (1972: 52).

The circumstances behind the reform of Canada's preventive confinement legislation came about in 1975 and 1976 with the intense debate - in and outside of parliament - over the government's proposal to introduce legislation abolishing capital punishment and the resulting strong reaction from interest groups, such as the police and correctional staff, as well as the general public.

During the course of the debate the idea emerged (although it was explicitly rejected by both the Solicitor General and the Minister of Justice) that the abolition of capital punishment required a "tradeoff" to allay the concerns of these interest groups and the general public. The result was the "Peace and Security Package": the legislative amendments in Bills C-83 and C-84, and other policy statements and program proposals on the subject of the control of violent crime.

The dangerous offender measure proposed by the Ouimet and Goldenburg Committees was resurrected as part of Bill C-83 but drew little attention in House of Commons and Justice and Legal Affairs Committee debates. Most of the attention focussed on the other provisions of Bill C-83, particularly the gun control measures.

Special interest groups, the media, and the general public also paid little attention to the proposed dangerous offender measure. Gun controls and wire-tapping measures were their dominant concerns. While Bill C-83 died on the order paper in the 1975-76 parliamentary session, its provisions - including the dangerous offender measure - were brought back virtually unchanged in the following session as part

of Bill C-51. Although critics - both within the Civil Service and outside - reiterated the weaknesses of the dangerous offender legislation, it was finally enacted in 1977.

Despite many challenges, the idea of dangerousness has become a buzzword in criminal justice and mental health circles. In addition to the expanded definition used in the 1977 Canadian legislation, the concept has increasingly been incorporated into civil mental health codes in North America and advocated in model criminal codes and government policy documents in the United Kingdom (Bottoms, 1977, 1978), France (C.R.C.P., 1976) and the United States (N.C.C.D. Council of Judges, 1969). In most instances the scope of the concept of dangerousness has been enlarged to include types of offender, such as the professional criminal and criminals involved in organized crime, not previously considered.

Criticisms of the psychiatric role in criminal justice have not been entirely without impact. There have been some efforts to "depsychiatrize" the notion of dangerousness in Britain (Floud, 1977, Young, 1977) Denmark (Svendsen, 1977, Waaben, 1977), the United States and Canada. In the United States, for example the Model Sentencing Act (National Council of Judges, 1963) and the Model Penal Code (American Law Institute, 1962) both contain special measures for dangerous offenders in line with the Peterson Commission's recommendation that the notion of dangerousness not be tied to that of mental abnormality. This Commission noted that:

"... for a finding of dangerousness a psychiatric report indicating that the offender is 'mentally abnormal' would not be required.... The definition of dangerous offender is an attempt to avoid psychiatric definitions of mentally abnormality, which are not necessarily accurate..." (Peterson, 1973: 156-157).

Further, according to the Commission, a dangerous offender is a person who, in the opinion of the Court, has a criminal tendency characterized by: "a pattern of repetitive behavior which poses a serious threat to the safety of others; b) a pattern of persistent aggressive behavior with heedless indifference to the consequences, or c) a particularly heinous offence involving the threat of infliction of serious bodily injury" (Peterson, 1973: 155).

Both the expansion of the concept of dangerousness and the criticisms of the psychiatric notion of dangerousness are clearly illustrated in the Canadian dangerous offender legislation enacted in 1977. This measure provides for a court hearing on whether or not a person is a dangerous offender in cases where a person meets the following criteria summarized below from pages 52-59 of Bill C-51 (House of Commons of Canada, 1977):

1. conviction for a "serious personal injury offence"

   a) an indictable offence (other than high treason, treason, first degree murder or second degree murder) for which the offender may be sentenced to 10 or more years of imprisonment, which involves the use or attempted use of violence against another person or conduct endangering or likely to endanger the life or safety of another person of inflicting or likely to inflict severe psychological damage upon another person;

b) one of the sexual offences previously enabling conviction as a dangerous sexual offender, that is, rape, attempted rape, sexual intercourse with a female under 16, indecent assault on a male or female, or gross indecency.

2. The offender meeting the criteria of (a) above is believed to constitute "a threat to the life, safety or physical or mental well-being of others on the basis of evidence establishing

i) a pattern of repetitive behaviour by the offender, of which the offence for which he has been convicted forms a part, showing a failure to restrain his behaviour and a likelihood of his causing death or injury to other persons in inflicting severe psychological damage upon other persons, through failure in the future to restrain his behaviour;

ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he has been convicted forms a part showing a substantial degree of indifference on the part of the offender as to the reasonably foreseeable consequences to other persons of his behaviour, or

iii) any behaviour by the offender associated with the offence for which he has been convicted that is of such a brutal nature as to compel the conclusion that his behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint.

The offender convicted of a serious personal injury offence meeting the criteria of part (b) above must be demonstrated "by his conduct in any sexual matter including that involved in the commision of the offence or which he has been convicted ... to have ... shown a failure to control his sexual impulses and a likelihood of his causing injury, pain or other evil to other persons through failure in the future to control his sexual impulses....

A person found to be a dangerous offender may be sentenced by the Court to an indeterminate period in a penitentiary in lieu of any other sentence that might be imposed for the offence for which he has been convicted. Application for a hearing on whether or not a person is a "dangerous offender" must be made after a person has been convicted of a "serious personal injury offence" but before he has been sentenced. The Attorney General of the province in which the offender was tried must consent to the application. The prosecutor must give at least seven days notice to the offender following application and, within the same time limit, inform the offender of the basis on which it was made and file a copy of the application with the court clerk or magistrate.

The Court hears applications without a jury. The offender may have counsel but this is not specifically provided for in the legislation. The Court must hear the evidence of at least two psychiatrists (one nominated by the prosecutor and one by the offender) as well as all other evidence it considers relevant, including the evidence of any psychologist or criminologist that the prosecution or the offender calls as a witness.

The new enlarged legislation includes, not only all those who might have been considered dangerous sexual offenders, but all those convicted of a "serious personal injury offence" who meet the other criteria of the legislation. As an indication of a response, however minimal, to the critiques of the psychiatric notion of dangerousness it may be noted within the new legislation that: (1) although the Court still relies on psychiatric testimony, psychiatrists are not

asked to provide evidence on the presence or absence of mental pathology and that, other expert witnesses, such as criminologists, may be called upon to testify; (2) finally, the Court does not have to accept the testimony of psychiatric and other expert witnesses in rendering its verdict. We should be careful, however, not to lay too much emphasis on these indices of "depsychiatrization". The Canadian dangerous offender legislation still fundamentally rests on the psychiatric predictions of dangerousness and the language of the legislation still implies those charged have a form of character disorder, if not a mental illness.

CHAPTER FIVE

The Persisting Popularity of Dangerousness Legislation

Given the volume of literature critical of the dangerousness concept, some researchers find its persisting popularity paradoxical.

> It is an astounding paradox to see the steady publication of research data over the past five to ten years showing the inabilities of predictors of dangerousness to make accurate estimations and simultaneously to observe state legislators and groups producing or recommending criminal and mental health codes and procedures which rely so heavily on the predictive concept... (Steadman in Madden and Lion, 1976:67)

What is the attractiveness of the concept of dangerousness? Why is it being retained in existing legislation and embodied in new legislation and policy when most interpretations of the evidence indicate that assessments of dangerousness are low in validity and reliability?

Of the key factors influencing the persisting popularity of dangerousness legislation perhaps most fundamental are matters of perception and definition. Both the origins and continuation of special legislation for dangerous persons are related to what Merton (1971:811) refers to as "the social perception of social problems".

> Popular perceptions are no safe guide to the actual magnitude of a social problem. Pervasive social problems that seldom have dramatic and conspicuous manifestations are apt to arouse smaller public attention than problems less serious, even when judged by the beholder's own values, that erupt in the spotlight of public drama.

There are four major instances of the influence of social perception and social definition. The first is that of the perceptual significance of distance: geographical, social and psychological. Following this principle, the death of thousands through natural disaster or revolution in a distant land is likely to affect us less than the highly publicized sex murder of a child in our own community. A single rape or serious offence of personal violence involving someone we know is apt to concern us more than hundreds or thousands of deaths or serious injuries occurring through a fashion we perceive as routine (for example, through automobile accidents). Crimes of sex and personal violence, particularly when they involve children, arouse powerful feelings of moral indignation that can be taken advantage of by moral entrepreneurs crusading on behalf of legislation for a particular aim (Becker, 1963).[15]

Second, there are certain widespread beliefs about the relationship between mental disorder and violence. One such belief frequently reported by the mass media is the notion that mentally disordered persons are dangerous and unpredictable in their behaviour and thus to be feared.

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15. A good example of this is the strong public outcry and sensationalist media coverage of the sexual assault and murder of Toronto shoe shine boy Emmanuel Jacques and the subsequent arrest and trial of the four men charged with the slaying. See, for example, Lee, Edgar (1978), "Jacques Might Be Alive If Hanging Kept" (Ottawa Citizen, March 23, 1978), Carrière, V., "Jacques Killers Sentenced to Life and Told Never to Expect Parole" (Toronto Globe and Mail), March 23, 1979:1 and 4). The Jacques case was used by local crusaders in a campaign to pass legislation to close down body rub parlours and clean up Toronto's Yonge's Street "strip". On this point see (Baum, 1979)

In newspapers it is a common practice to mention that a rapist or murderer was once a mental patient. ... Often acts of violence will be connected with mental illness on the basis of little or no evidence...

Newspapers have established an ineluctable relationship between mental illness and violence. Perhaps as importantly this connection also signifies the incurability of mental disorder; that is, it connects former mental patients with violent and unpredictable acts.

...Newspapers now use teletype release from the press associations and since these associations report incidents of crime and violence involving mental patients from the entire nation, the sampling bias in the picture presented to the public is enormous.

There are approximately 600,000 adults confined to mental hospitals in the United States on any one day, and an even larger groups of former mental patients. The newspaper practice of daily reporting the violent acts of some patients, or former patients, and at the same time, seldom indicating the size of the vast group of nonviolent patients, is grossly misleading. Inadvertently, newspapers use selective reporting of the same type that is found in the most blatantly false advertisements and propaganda, to continually "prove" that mental patients are unpredictably violent.

The impact of selective reportage is great because it confirms the public's stereotypes of insanity. Even if the newspaper were to explain the bias in these stories, the problem would not be eliminated. The vivid portrayal of a single case of human violence has more emotional impact on the reader than the statistics which indicate the true actuarial risks from mental patients as a class (Scheff 1966:71-74).

A third instance of the influence of social perception and definition is the attribution of causes for troublesome conditions and responsibility for their occurrence and control. Such attributions have implications for whether or not a given condition will even be viewed as a "problem" in the first place. Some phenomena, such as "natural catastrophes", are perceived as "acts of God" that cannot be controlled (Marx, 1977). Other phenomena, such as traffic accidents, are typically perceived as routine or normal consequences of routine, widespread activity. On the other hand, still other phenomena, such as violent offences and sex offences against children, are unlikely to be seen as either acts of God or as routine, "normal" events. They are likely to be seen as the outcome of the State's failure to control highly dangerous, perhaps mentally disordered, individuals whom it has the authority and duty to identify and incapacitate. People in general are likely to favour a cautious approach in ensuring that the dangerous are locked up. They are less likely to be concerned with the false positive problem - the confinement of individuals who, although they may have committed violent or sexual offences before, are not likely to do so in the future.

A fourth instance is the phenomenon of the tendency of individuals to seek "meaningful" and "orderly" accounts of life whether these are grounded in science, religion, philosophy or some other general ordering system. Psychiatry is turned to precisely because individuals perceive psychiatric accounts as enabling the classification and prediction of even that which is among the most "irrational" and "unusual" elements of life.

Perhaps the best documented instance of these points about social perception is that of the sexual psychopath laws in the United States. In a number of instances a single act of sexual assault or murder of a child sparked the processes leading to passage or amendment of the sexual psychopath or sexually dangerous person laws. There is still no objective evidence that sexual assaults by "dangerous psychopaths are widespread nor that the legislation and the programs based on it have led to identification, confinement and care of such persons. (Steadman, 1980)

In Britain , the dramatic influence of the acts of a single individual on policymakers is well illustrated by the case of Graham Young, the infamous "St. Albans poisoner" (Holden, 1974; Young, 1973). At the age of fourteen, Young pleaded guilty to poisoning his father, his aunt, and a schoolfriend. He was diagnosed as a psychopath and sent to Broadmoor hospital for the dangerous criminally insane on a hospital order with the restriction that he must not be released without the authority of the Home Secretary for a period of fifteen years. In 1970, after serving eight years, he was released. One year later, in a trial which received sensational media coverage, he was found guilty of two counts of murder and attempted murder. On his own request, he was sentenced to life in prison rather than returned to Broadmoor. Although Young was then only the first person[16] released from a restricted hospital order to be convicted of murder, his widely publicized case led to strong criticism of government policy and was influential in the forming of several special committees to prepare reports.

16. Not long after, another sensational case, that of the murderer Terence Illiffe, resulted in an increased attack on government policy.

The first published report, that of the Aarvold Committee report (1973) resulted in extensive tightening of the security procedures with regard to restricted hospital orders. The Aarvold report was followed by the report of a more general inquiry on measures for mentally abnormal offenders which was headed by Lord Butler (1975). Certain of the Butler recommendations, along with the preliminary obervations of yet a third committee headed by Jean Floud, indicate interest in the enactment of new special measures for dangerous offenders (Floud, 1977; Young, 1977). The important point is that all of these enacted or proposed measures were, to a considerable degree, a response to the publicity generated around the spectacular cases of Young and Illiffe.

In Canada, it also appears likely that isolated dramatic events may have played an important role in the government's decision to include a measure for dangerous offenders in its Peace and Security Package against violent crime in the mid-1970s. Most notable was the Gagnon incident of 1974 in Calgary, Alberta in which a newly released inmate, Philippe Gagnon, killed a policeman, wounded six others, and was himself killed in a shootout.

Gagnon was an inmate with a history of mental disorder serving a three year sentence in Drumheller penitentiary in Alberta for rape and aiding and abetting an assault. Prior to being sentenced to Drumheller in 1971, he had been twice committed involuntarily to the Alberta Hospital at Oliver. After he had served two-thirds of his sentence at

Drumheller he was released on mandatory supervision. He was taken into custody again on November 29, 1973, after "deterioriation in his behaviour" and again released on mandatory supervision on June 23, 1974. His sentence officially expired on November 12, 1974.

During Gagnon's stay at Drumheller, a number of reports by penitentiary clinical staff and parole officials pointed to his mental disturbance and dangerousness. Gagnon was noted to be "highly emotional and explosive in his personality", "out of contact with reality", and as "having a tendency toward violence under the influence of intoxicants".

On May 23, 1974, a Canadian Penitentiary Service psychiatrist diagnosed Gagnon as a chronic schizophrenic. The psychiatrist felt that Gagnon's problem was basically not one of the criminality and that if he did not function adequately on the outside, he should be in a mental hospital for extended treatment rather than returned to jail. Gagnon's parole officer referred to him as "having a high potential for danger" and as "more a candidate for a mental hospital than for a gaol".

Gagnon's history of mental disorder and the report of penitentiary and parole officials on his mental state and dangerousness led to the question of whether civil commitment should be sought for him upon his release on mandatory supervision. Gagnon, however, was resistant to psychiatric treatment and would not agree to informal commitment. There was also apparently some doubt that he could successfully be involuntarily hospitalized. A newspaper report (Globe and Mail, February 1, 1975) stated:

> Dr. Letts [a psychiatrist who examined Gagnon at Drumheller] did not suggest Gagnon be committed to a mental hospital because he felt forcing him in would cause further deterioration and that he wouldn't be kept in hospital for long anyway.

Shortly after Gagnon's release the tragic shootout resulting in the deaths of both Gagnon and a policeman occurred.

The Gagnon incident, the subsequent concern by politicians and the media (Taylor, 1974) and the Gilkes-Salus (1975) Inquiry's call for dangerous offender legislation all occurred at a crucial time in the public debate over the abolition of capital punishment. Government officials were seeking alternatives to control violence that would allay the public's fears. The spectre of the Gagnon incident and its aftermath and the anticipation of other such incidents were likely factors in the Government's decision to ignore criticisms of the proposed dangerous offender legislation and include it as part of its Peace and Security Package against violent crime.

A second major factor influencing the popularity of the dangerousness notion and a recurring theme behind the call for dangerous offender legislation in many jurisdictions, is the lack of articulation between criminal law and civil law social controls. The case of the dangerous mentally disordered offender who is not certifiable under civil commitment laws occurs with sufficient

frequency and visibility to be regarded by North American correctional and mental health officials as a serious problem. On the basis of an examination of the provincial and territorial mental health statutes and discussions with psychiatrists across Canada, Epstein (1976:2) noted "problems of a very serious nature" associated with efforts to commit allegedly dangerous and mentally disordered inmates scheduled to be released. First, the psychiatrists Epstein spoke to were unanimous in stating that certification would only be justified for something more than personality disorders, that is, an actual, well-recognized mental illness of some category such as paranoia, schizophrenia, depression, brain disease or acute alcoholism. Second, they noted the problems of diagnosing dangerousness and predicting future violent acts. Epstein notes that mental health specialists are apprehensive, with good reason, about the consequences of wrong decisions, particularly with respect to those cases where persons judged as not mentally disordered or dangerous in the manner and degree necessary for certification commit serious crimes. Third, there was the problem that even if a patient might be certifiable, that person might not be accepted by a provincial psychiatric facility.

> Such an attitude on the part of the provinces could arise from a feeling that the person could not be treated, or from a lack of secure facilities, or simply from the feeling that persons with criminal records ought to be dealt with by the prison and penitentiary systems and not by the hospitals. All of the provincial mental health acts either contain a specific provision allowing the hospitals the discretion to refuse to admit persons as patients, or else imply that admission is discretionary and may be refused in an appropriate case. (Epstein, 1976:3)

In England and Wales, the Butler Committee report (1975) also recognized the problem of instances where the regular civil and criminal controls did not apply. To deal with such cases, the Committee advocated a wholly indeterminate, but reviewable, sentence for dangerous offenders. This measure would be used for individuals convicted of certain serious offences who either showed signs of mental disorder that were not covered under the Mental Health Act or were judged to be psychopaths with dangerous, anti-social tendencies who could not be treated satisfactorily at a hospital (Butler, 1975:73-76).

A third major factor behind recent interest in the dangerousness concept is the tendency to advocate "bifurcation" in social control policy, that is, tough line measures for "serious" offenders (particularly when violence or the threat of violence is involved) and soft measures for "minor" offenders (particularly when offences against property, not persons, are involved).

Bottoms (1978) noted this trend in England and Wales where non-custodial offences such as community service orders have been called for an increasingly given in the case of minor offenders. In the case of serious offences, such as those involving weapons, sentence length has increased (Bottoms, 1977:88).

Bifurcation has also been advocated in the United States as well. For example, a National Council of Crime and Delinquency policy statement (1973:449) proposes that "confinement is necessary only for offenders who, if not confined, would be a serious danger to the public".

Although many states have promoted diversion programs and some states are reducing penalties for "minor" drug offences, the use of a dangerousness standard for confinement or release is increasingly being advocated. Morris (1974:62) notes that it has "been accepted by two national commissions, by the American Law Institute, by the National Council on Crime and Delinquency in its Model Sentencing Act and its policy statements, by many commentators and in many criminal codes".

In Canada, Price (1970:242) cites the Ouimet Report as contending that:

> a more systematic use of procedures to identify and isolate the dangerous offender could well provide that measure of public acceptance of reform proposals that would lead to a gradual modification of the severity of sentences imposed on the offender population as a whole.

Government officials in Canada have developed a variety of alternatives to incarceration for minor offenders and diversion programs while introducing longer sentences for serious offences such as murder and a dangerous offender provision.

Although a clear tendency toward bifurcation in actual legislation and policy has not yet developed throughout Europe and North America, it appears to be increasingly taken as an ideal. Why is this so?

There appear to be several major reasons including the rising costs of criminal justice operations, doubts about the efficacy of institutional correctional programs, and civil rights concerns. There is also the positivist dream that scientific advances will enable the identification and treatment of dangerous persons.

The positivist dream of separating the dangerous from the non-dangerous lingers despite a lack of evidence that it can be done with high validity and reliability. The Ouimet Committee merely expressed the hope that the prediction of dangerousness could be made; it did not base this hope on research findings. When the Ouimet Committee was conducting its investigation in the late 1960s it was true that little relevant literature existed. When the dangerous offender proposals were considered for the Canadian Federal Government's Peace and Security Package some five years later, however, considerable literature did exist in the United States, notably: the Bridgewater Research (Kozol et al, 1972, 1973; Kozol, 1975, Cohen, et al, 1978), the reviews of Monahan (1973, 1975), the Baxstrom studies (Steadman and Cocozza 1972, 1974, 1975), and the evaluations of the Maryland Defective Delinquent legislation and treatment program (State of Maryland, 1973, 1976; Sidley, 1974, Wilkins, 1976, Hodges, 1971; Prettyman, 1972; Crowley, 1973). This literature as well as Canadian research (Quinsey, 1975a, b, c, d), critical material and recommendations (Greenland, 1971, 1972, 1976; Klein, 1976; Price, 1970a, 1970b; Price and Gold, 1976; Law Reform Commission of Canada, 1975) was ignored or passed over. The thrust of the Ouimet (1969) and Goldenburg (1974) Committee reports was retained in the dangerous offender legislation finally enacted in 1977.

A final key factor behind the persisting popularity of dangerousness legislation is that such legislation can serve certain "political" or ideological functions.

Government representatives are, of course, generally quite sensitive to their constituents' concerns; they are subject to pressures from powerful interest groups, both within and outside the government. In Canada, for example, police and correctional employee associations were powerful influences in shaping the nature of the entire "Peace and Security package", of which the dangerous offender measure was a part. Arguing that they faced great and increasing dangers in dealing with violent criminals, these groups called for tough measures such as capital punishment to protect both themselves and the public; they ignored critics, who felt that there was little evidence that such measures would indeed increase public safety.

Politicans and government officials realize that even if they cannot readily solve a problem it is important that they demonstrate their concern. That the nature and extent of problems are misperceived or masked and that solutions are "symbolic" rather than "instrumental", may be overlooked as long as the public is appeased. Gusfield (1967:177) notes:

> A law weak in its instrumental functions may nevertheless perform significant symbolic functions... The passage of legislation, the acts of officials, and decisions of judges... have a significance as gestures of public affirmation.... The existence of law quiets and comforts those whose interests and sentiments are embodied in it.

In addition to giving the impression that it solves a problem, dangerous offender legislation has other important ideological uses. Such legislation emphasizes certain types of act or situations considered dangerous; attention is drawn to individual violence rather than social conditions or practices which more seriously threaten our health and safety. Several authors (Geis and Monahan, 1976, Shah, 1977, 1978; Pfohl, 1977b; Bottoms, 1977) have noted that unsafe working conditions, drunken driving, and industrial pollution are not defined as dangerous in a sense which would justify adopting special penal measures to "protect the public". Emphasizing highly visible, dramatic situations in legislation, draws attention from harmful situations or practices which, although more widespread or greater in impact, are less salient. Often these less salient dangerous conditions are linked to the interests of powerful groups such as large corporations who possess the means to conceal their actions or avoid responsibility for them.

Another important ideological function of dangerous offender legislation relates to the explanatory framework for human behaviour underlying it. First, "dangerousness" is viewed as a property of individuals. The legislation's concentration on sexual offences and individual violence reflects an individualistic explanatory model of human behaviour rather than one concerned with social, structural and cultural factors. Second, psychiatrists are called on to explain the dangerous behaviour of individuals on trial and predict what they are likely to do in the future. Often, the legislation itself stipulates that the "dangerous" behaviour in question be shown to result from an individual pathological condition such as

psychopathy. As Pfohl (1977b:95) notes: "By emphasizing the importance of one explanatory framework (psychiatric) to the near exclusion of another (social), psychiatric assessments of dangerousness function to control the acceptability of certain 'realities' as well as behaviours."

Policy-Makers, Research on Dangerousness, and the Public

Most reviews of research on "dangerousness" reflect a civil libertarian stance; they conclude present knowledge does not justify indeterminate preventive confinement. A major focus is on the problem of "false positives". False positives are detected only through follow-up studies (Kozol et al, 1972; Steadman and Cocozza, 1974; McGarry and Parker, 1974; Jacoby and Thornberry, 1977) of individuals released against the judgement of their clinical assessors. The plight of over half of the individuals detained as dangerous is that they do not have the opportunity to be detected as a false positive because they are not released.

In contrast with research reports and their concern with false positive levels, most media reports focus - often dramatically, on the problem of "false negatives"; individuals diagnosed as insufficiently dangerous to confine (or as safe enough to release) who are later convicted of serious acts of personal violence or sexual offences.

The title of a 1977 Toronto Globe and Mail editorial, "Protect the Violent, or the Public?", indicates less concern with the plight of the false positive than with public protection and with the victims of violent and sexual offenders. It is true, too, that allegedly dangerous personality disordered offenders and mentally disordered persons are not a large, nor vocal, nor highly regarded interest group. Once confined, they have little access to public forums where their views can be heard and taken into account. They must rely largely on civil liberties groups to represent their interests.[17] In the pragmatic sense, governments, in formulating policy, certainly face considerably more pressure from the media[18] and vocal members of the general public than from the small number of individuals confined on the basis of their diagnosis of dangerousness.

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17. While civil libertarians tend to point to actual false positive rates and the "needless" deprivation of the liberty of the individuals involved, those who stress public protection tend to cite dramatic individual cases, not statistics, often implying that such cases are widespread. The level of equivalence of false positives to false negatives, ie.., what number of "false positives" would be construed as equal to one "false negative" is, however, not subject to exact calculations.

18. The concern of legislators with the media's dramatization of events is particularly well indicated by the following remarks made by a Maryland government official with regard to the functions of indeterminate confinement under the defective delinquency legislation.

> I do not believe that the work of this Institution [Patuxent] to date is to be assessed on the basis of startling and dramatic rehabilitation and parole. Less dramatic but more important is ... that many sensational headlines have been avoided because Maryland has been able to keep in quarantine many deadly and dangerous convicted criminals.... (J. Robinson, Address on Defective Delinquency, presented at the General Assembly of the States Council in State Governments, Chicago, Ill., Dec. 5, 1958, p. 6, cited in R. Gordon, 1978, f.n. 135, p. 255.

In the case of the 1977 Canadian dangerous offender legislation, other factors in addition to a concern with the salience of false negatives played a role in its enactment. Perhaps most important was the government's concern with developing a program that would satisfy both special interest groups and the public. Polls indicated about eight percent of the public sampled favoured some form of capital punishment under at least some circumstances. Dramatic new stories came from the media on the slayings of police officers and the crimes of escaped parolees. Angry members of the public sent letters to newspapers and called hot-line radio shows criticizing the government for its stance on abolition and for failing to protect citizens against crime. Under this pressure the federal government apparently sought a compromise in the form of stringent measures (long-term incarceration, the dangerous offender legislation and gun controls) to allay these concerns about violent crime.

In the political arena where elected officials, similar policy-makers and agents of social control must be accountable to the general public. In reconciling the conflicting views of competing and powerful interest groups, arguments based on scientific data are not the only consideration of state officials. In their concern with demonstrating responsiveness to the public and, no doubt, with remaining in power, they are pushed toward a policy of cautiousness in decisions about the confinement nd release of allegedly dangerous persons (Cray, 1977, Calgary Albertan, 1975). The sensitivity of politicans and government officials to interest groups and media is evident in Canada's dangerous offender legislation - a measure which is clearly more symbolic than instrumental in its impact.

CHAPTER SIX

Implications for Legislation and Policy in Canada

> The past suggests that neither the policymaker nor the public care to know the facts that belie our assumptions of violence and mental illness. However, public disinterest and inaccurate fears are insufficient justification to avoid a major policy review in the uses of predictions of dangerousness. (Steadman and Cocozza, 1975:84)

Preventive confinement legislation in Canada, since its initial enactment in 1947 and 1948, has largely rested on a knowledge base of myth, clinical opinion, and speculation. This situation is not unique to Canada; it holds for the many other jurisdictions with similar legislation for dangerous offenders.

The Canadian Habitual Offender legislation of 1947 was enacted just as the English counterpart on which it was modeled was being abolished because of evidence of its ineffectiveness - in particular, its failure to deal with dangerous as opposed to petty offenders. The 1948 Canadian Criminal Sexual Psychopath legislation modeled on legislation in Massachusetts soon proved to be so unworkable that it was amended drastically. The 1958 McRuer report which suggested modifications that led to the Dangerous Sexual Offender legislation of 1960 did not address the question of the problems of predicting dangerousness and did not consider sociological research (Tappan,

1950; Sutherland, 1950a, 1950b) arguing that the sexual psychopathy statutes were based on myths about the prevalence of sex crimes and the characteristics of sex offenders.

Price (1970a:243), in commenting on the Canadian Committee on Corrections' recommendations on dangerous and mentally disordered offenders, noted the failure of the Committee to ground their recommendations on a review of research and existing practice on sentencing.

> One looks in vain in the Report of the Canadian Committee on Corrections for any analysis of sentencing structure as a whole, including any attempt to relate length and types of sentences under the Criminal Code either to available criminological and correctional data or to the accumulated experience of other jurisdictions.

The dangerous offender legislation eventually enacted in 1977 can be criticized on the same grounds. Not until the dangerous offender provision had been drafted and Bill C-83 was about to be submitted to the House of Commons Justice and Legal Affairs Committee was there evident concern with developments in foreign jurisdictions.

In addition to the federal government's lack of attention to the experience of foreign jurisdictions, the 1977 legislation did not take much account of the by then considerable literature on the problems of assessing dangerousness, on human rights issues associated with

preventive confinement (right to treatment, least restrictive alternative principle, etc.) and on the limited effectiveness of institutional correctional treatment programs.

The result of the federal government's decision to largely overlook the most recent critical literature on dangerousness is that the dangerous offender legislation is out of step with the current criminological thought and recent developments in policy and legislation in such jurisdictions as Finland, Denmark, California and Maryland. To create effective legislation, they must be more attentive to developments - historical and contemporary - across reearch knowledge base. Given the questionable conceptual and empirical underpinnings on which legal controls for dangerous persons rest, on the one hand, and the great fear aroused by images of mentally disordered or character-disordered violent and sexual offenders, on the other hand, what reasonable solution might a policy-making body take?

One solution would be to ban the legislation altogether and use the regular sentencing structure and civil commitment measures with the view that - even with the gaps in social protection that might result - violent crime is too infrequent a phenomenon to warrant

special legislative measures with their attendant human rights problems.[19]

An argument can also be made, (see example, Walker 1978:32-43), that special controls are warranted for offenders more likely to commit future acts of violence than the average offender. Highly dangerous individuals, unlikely to be contained by regular sentencing provisions or civil commitment, do exist; the problem is to identify them accurately and to contain them in a fashion that protects the public and safeguards basic human rights.

If dangerous offender legislation is to be retained, an attempt should be made to respond to the problems of assessment and prediction in both sentencing and release.

First, to reduce absolute numbers of false positives, the statutory criteria for dangerousness must be more strictly defined. Because "no one at least as yet can predict dangerous behavior in an

19. See, however, Gordon's (1977) discussion of the Bridgewater Massachusetts Sexually Dangerous Persons research (Kozol et al, 1972, 1973, Kozol 1975, Cohen, et al 1978, Monahan, 1973, Schwitzgebel, 1977, Roesch, 1977). Using the analogy of baseball batting averages, Gordon argues that probabilities, which one might consider "low" in absolute value, may be viewed as "high" relative to the range of actual probabilities being considered. A .300 batting average indicates "only" 3 hits for each 10 times at bat. Most batting averages, however (for individuals at bat more than 300 times a season), fall between .200 and .300, few are above .300, and averages of .400 or over are rare. The person who hits over .300, as anyone who follows baseball knows, is a "dangerous" hitter. Using this analogy, Gordon argues that given the low base rates for criminal violence and a tendency for existing research to assess as dangerous less than 20% of a sample who will be convicted in a violent offence, "correct" assessments in 3 out 10 cases may appropriately be viewed as "high", and 7 out 10, false positives, "low". Gordon, however, is an exception among researchers (e.g., Monahan & Cummings, 1976) who typically point to the policy implications of "high" - in the conventionally understood sense - false positive levels.

individual with no history of acting out" (Kozol et al cited in Megargee, 1976), a stringent definition of dangerousness based on detailed evidence of a previous history of violence (including convictions and arrests for offences involving violence of its threat) is desirable.[20] Sentencing under dangerous offender legislation should be restricted to the most serious personal violent offences (with the exception of first and second degree murder with their present mandatory - 25 year minimum in prison - life sentences) and sexual offences involving minors. Consensual sex acts not involving violence or its threat (for example, "gross indecency" between adults and "sexual intercourse with a female between fourteen and sixteen" should not be part of the legislation's offence criteria.

Second, vague imprecise terminology and unfounded assumptions should be removed from the statement of the legislation. Jobson (1976), for example, points to problems in interpreting such phrases in the legislation as "severe psychological harm", "showing a failure to restrain", "pattern of repetitive behaviour", "persistent and aggressive behaviour" and "indifference... to ... reasonably foreseeable consequences". He questions the use of terms like "indifference" on the grounds that offenders positively desiring to hurt others would not be included under the legislation. He notes, too, that there is no scientific evidence that the "brutal nature" of an offence is an indicator that an individual's "behaviour in the future is unlikely to be inhibited by normal standards of behaviour restraint".

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20. For an example of such a model see Pfohl's (1979) discussion of the Alabama dangerousness assessment project.

In seeking an alternative, comparative analysis can be of help. Two of the most useful models are the Danish statute of 1973 and the Finnish statute of 1975. In each of these statutes the terminology is more precise than in the Canadian legislation. Consensual acts are not included; only the most serious acts of actual or threatened violence are included as offence criteria.

The Danish statute restricts forvaring to persons convicted of one or more serious violent offences who are regarded on the basis of their personal history and the circumstances of their offence to present such an "imminent danger" to others that preventive confinement is necessary. The even more tightly defined Finnish Dangerous Recidivist statute is restricted to offenders who: (a) have been sentenced to at least two years for one or more serious offences; (b) have been previously convicted of such a crime within the last ten years; (c) are regarded as dangerous to the life or health of others on the basis of the circumstances of their offence and reports on their personality.

Besides tighter definition, another way in which legal controls for dangerous persons can be improved is through the development of new criteria and procedures for assessing dangerousness. Of primary importance is the necessity to consider the interplay between situational and circumstantial factors and individual characteristics in violence and to determine ways how to incorporate information about such inter-relationships in social policy and clinical decisions. (Monahan, 1980)

Second, there is the question of who should carry out assessments of dangerousness for the purposes of confinement or release. Some jurisdictions use three or five person boards composed of members of the legal and medical professions, the social and behavioural sciences, and the general public.

In Sweden, for example, a three person board - a judge (the chairperson) doctor, and layperson - determines suitability for release under the "surrender for special psychiatric care" provision for the criminally insane. For the internment procedure for recidivists, a five person board (one judge, one doctor and three laypersons) makes decisions on confinement and release.

In Finland, a five person board composed of the head of Prison Administration and four others (including at least two judges and at least one psychiatrist) makes assessments of dangerousness for purposes of confinement and parole under the Dangerous Recidivists statute.

In the face of empiricial evidence that psychiatrists are not better at predicting future violence than other professionals (Dershowitz, 1969 in Ennis and Litwack, 1974:712), a mixed composition assessment board is preferable to psychiatric assessment alone. Although there is no substantial evidence suggesting such a board would be better, it at least has the virtue of taking into account

perspectives other than the psychiatric one. Steadman and Cocozza (1978) suggest further, on the basis of their own research, that actuarialprocedures be used to assist those responsible for decisions on confinement or release.

Assessment procedures themselves might be made more rigorous by requiring the use of guidelines for assessing dangerousness that included the following:

1. an estimation of the likelihood of future criminal or other "anti-social activity", its nature and seriousness, and the types of situations or circumstances under which it would appear most likely to occur;
2. a statement of the assessors' subjective certainty with regard to their assessment of the likelihood of future harmful actions;
3. a statement of the assessors' reasons for their decisions; and
4. a recommendation of what would be the most appropriate correctional setting to (a) protect the public, (b), rehabilitate the offender.

Because of the high rate of false positives associated with assessments of dangerousness, considerable care should be taken in determining an appropriate standard for designating someone as dangerous. In criminal trials a standard of "beyond a reasonable doubt" is used. This makes sense because the determination is one that involves something that has already happened. In civil

commitment trials "a preponderance of the evidence" standard is used. At least a partial basis for this is the fact that the determination involves a future state, something that has not yet occurred. Dangerous offender hearings - hearings which involve a prediction of the future behaviour of someone already convicted by a "criminal" standard - pose a problem: what standard should be used? Predictions of violence in those assessed as dangerous cannot meet "civil" let alone "criminal" standards.

Monahan and Wexler (1978) argue, however, that it is a misconception to take the view that predictions of future violence in those assessed as dangerous must be accurate at the level of one or the other of these standards. They contend that "one must prove to a given standard only that a specified probability threshold has been crossed, the threshold being decided on a priori policy grounds" (Monahan and Wexler, 1978:39). A hearing to assess dangerousness could thus require "beyond a reasonable doubt" certitude that a person possessed certain characteristics or had engaged in certain actions and that these characteristics were associated with "x probability of violent behaviour occurring in a given time period". The decision as to what probability would be sufficient to justify confinement would be a social policy one. As Gordon (1977) notes three out of ten correct assessments might be regarded as justified given the current state of violence prediction.

Ultimately, the question to retain or abolish dangerous offender legislation is a moral one and a social policy one: where do we draw the line in establishing a balance between individual rights and social protection? Because it is unlikely that false positives can ever be greatly reduced from their present level, a false positive rate of more than fifty per cent may simply be the price the public pays for legislation whose effects are more demonstrably "symbolic" than "instrumental".

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